NO. 20137

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY GAMERO, also known as
ENRIQUE GAMERO,

Appellant,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE, LOS ANGELES DISTRICT;
George K. Rosenberg, as District Director,

Respondent.

BRIEF OF RESPONDENT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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BRIEF OF RESPONDENT

JURISDICTION

The District Court had jurisdiction of the within cause pursuant to 28 U.S.C. 2241 et seq., and §106(b) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1105a(b).

This Court has jurisdiction of the within cause pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant, a 54-year old native and citizen of Mexico, originally entered the United States for permanent residence in

1916 (R. 8(a)). [1] He left the country in 1943, and remained outside the United States until June 12, 1961, when he was paroled into the United States for a period of three days to attend the funeral of his mother-in-law. (R. 8(a)). Subsequently, an exclusion proceeding was conducted and on October 4, 1961, the Special Inquiry Officer ruled that he was an excludable alien under the provisions of Section 212(a)(20) of the Immigration & Nationality Act of 1952, 8 U.S.C. 1182(a)(20), as an immigrant not in possession of a valid immigration visa. Appellant's administrative appeal from the exclusion order was dismissed by the Board of Immigration Appeals on November 20, 1961. (R. 8(a), 9, 10).

Thereafter, appellant filed a motion with the Board to reopen the exclusion proceedings permitting him to make application under Section 212(c) of the Immigration & Nationality Act, 8 U.S.C. 1182(c), or Section 211(b), 8 U.S.C. 1181(c), for a waiver of the entry documents required of immigrants. In this connection appellant contended that he had never relinquished his residence in the United States and that his absence therefrom was not voluntary and only temporary in nature. Appellant argued that his departure from the United States for eighteen years was temporary and involuntary in that it was the result of a natural compulsion to attempt to locate his mother who had disappeared. On January 30, 1964, the Board denied his motion to reopen,

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1/ R. refers to pages of the certified Administrative Record of the Immigration & Naturalization Service relating to appellant and heretofore filed with this Court.

holding that his absence of approximately eighteen years could not be considered temporary within the meaning of either Section 211(b) or 212(c). The Board held in effect that the appellant was statutorily ineligible for the relief sought and that accordingly no purpose would be served in ordering the exclusion proceedings reopened.

On February 28, 1964, the District Court for the Southern District of California dismissed appellant's declaratory judgment action, holding that his remedy, if any, was habeas corpus. Appellant filed a complaint for writ of habeas corpus in the United States District Court for the Southern District of California on March 24, 1964. Judgment was entered on October 5, 1964, denying the writ of habeas corpus. Appellant now appeals from this judgment of the District Court denying the writ of habeas corpus.

ISSUES PRESENTED

1. Was appellant denied the opportunity to present evidence during his exclusion proceedings that his eighteen year stay in Mexico was a temporary departure within the scope of Sections 211(b) and 212(c) of the Immigration & Nationality Act of 1952?

2. Is appellant eligible for the discretionary relief afforded by Sections 211(b) and 212(c) of the Immigration and Nationality Act of 1952?

STATUTES INVOLVED

Section 212(a)(20) of the Immigration & Nationality Act, 8 U. S. C. 1182(a)(20) provides in pertinent part:

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> "(20) Except as otherwise specifically provided in this chapter any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(e) of this title."

Section 212(c) of the Immigration & Nationality Act, 8 U. S. C. 1182(c) provides in pertinent part:

> " . . . (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful

unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) - (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title."

Section 211(b) of the Immigration & Nationality Act, 8 U.S.C. 1181(c) provides in pertinent part:

"(c) The Attorney General may in his discretion, subject to subsection (d) of this section, admit to the United States any otherwise admissible immigrant not admissible under clauses (2), (3), or (4) of subsection (a) of this section, if satisfied that such inadmissibility was not known to and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission."

ARGUMENT

I

APPELLANT WAS GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE DURING HIS EXCLUSION PROCEEDING THAT HIS EIGHTEEN YEAR STAY IN MEXICO WAS A TEMPORARY DEPARTURE WITHIN THE SCOPE OF 211(b) AND 212(c) OF THE IMMIGRATION & NATIONALITY ACT.

Appellant had the opportunity to present evidence on the nature of his departure to Mexico but the record demonstrates the failure of appellant and his counsel who has represented him throughout the course of these proceedings to make a timely presentation of that and supporting arguments at the hearing before the Special Inquiry Officer in 1961. The resultant decision of the Special Inquiry Officer, dated October 4, 1961, clearly demonstrates that appellant only sought a delay in his exclusion until Congress had an opportunity to take action on a private bill which would have permitted appellant to be admitted to permanent residence notwithstanding the provisions of Section 212(a)(22) of the Immigration & Nationality Act, 8 U.S.C. 1182(a)(22). In other words, on October 4, 1961, when the appellant was ordered excluded and deported from the United States as charged, his claim of status as a lawfully returning resident alien could have been made and adjudicated. His failure to do so was tantamount to a confession on his part that he was not a returning resident alien at all. This position is further established by the fact that appellant almost immediately thereafter caused a private bill HR 8298,

to be introduced into the Congress of the United States on July 12, 1961, which provided as follows:

> " . . . That notwithstanding the provisions of Section 212(a)(22), 8 U.S.C. 1182(a)(22) of the Immigration & Nationality Act, Henry Gamero may be issued a visa and admitted to the United States for permanent residence if he is found to be otherwise admissible under the provisions of the Immigration & Nationality Act. . . . "

This bill was acted upon adversely by the Congress on July 25, 1963. The appellant's departure from the United States in 1943, during a time when the United States was exerting every effort toward the successful termination of World War II, brought him within the excluding provisions of Section 212(a)(22) of the Immigration & Nationality Act, 8 U.S.C. 1182(a)(22), which provides as follows:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive a visa and shall be excluded from admission into the United States:
>
> "(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as non-immigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the Armed Forces in

time of war for a period declared by the President to be a national emergency, except aliens who at the time of such departure were non-immigrant aliens and who seek to reenter the United States as non-immigrants. . . ."

Appellant first sought to establish that he was a legal and permanent resident of the United States in a motion to reopen denied by the Board in an Opinion of October 10, 1963, and specifically sought relief under Sections 211(b) and 212(c) of the Immigration & Nationality Act in a motion to reopen denied by the Board in an Opinion dated January 30, 1964. Although these motions to reopen were based upon information and circumstances present and known to appellant at the time of his October 1961 hearing, the Board considered the offered evidence and denied each motion on its merits. The denials of the motions to reopen were in full accord with 8 C. F. R. 3.2 which states:

". . . Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was

fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. . . ."

II

APPELLANT IS NOT ELIGIBLE FOR THE DISCRETIONARY RELIEF AFFORDED BY SECTIONS 211(b) AND 212(c) OF THE IMMIGRATION & NATIONALITY ACT.

The exclusion order should be upheld as an absence from the United States of eighteen years cannot, under the circumstances of this case, be held to be a temporary absence. It is clear that appellant is not eligible for the discretionary relief afforded by Sections 211(b) and 212(c) of the Immigration & Nationality Act. Appellant contends that he should not be excluded from the United States because he is eligible for a waiver of the documentation requirements. He contends, contrary to the Board's finding, that his eighteen years absence from this country was temporary. In this connection a grant of Section 211(b) or 212(c) relief is ultimately a discretionary determination entrusted to the Attorney General, such determination being subject to judicial review only on a showing of clear abuse of discretion. Jay v. Boyd, 351 U.S. 345, 353, 354 (1956). Judicial review of these decisions is governed by Section 106(b) of the Act, 8 U.S.C. 1105(a)(b). Habeas corpus review of exclusion orders has generally been

limited to the review of the administrative record, Gordon and Rosenfield, Immigration Law & Procedure (1963), Section 8.7(g), pp. 835-7.

Appellant, in his complaint for writ of habeas corpus, states that in April of 1943 he went to Mexico to locate his mother, that he found her in an insane asylum, that in 1953 his mother died, that he made efforts to return to the United States and in 1961 was paroled into the United States. This can hardly be viewed as a temporary absence from this country. Section 211(b) of the Immigration and Nationality Act, 8 U.S.C. 1181(b) reads:

> "Notwithstanding the provisions of Section 1182(a)(20) of this title, in such cases or such classes of cases and under such conditions as may be by regulation prescribed, otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily may be readmitted to the United States by the Attorney General, in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation."

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) reads:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation,

and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . ."

The Board of Immigration Appeals found that there was no merit in the argument that appellant's departure from the United States was involuntary and the result of a natural compulsion and driving force in trying to locate his mother who had disappeared years previously from Los Angeles, California. Furthermore, the Board found that his remaining outside the United States for almost twenty years was not persuasive of the fact he departed temporarily. The case was differentiated from Rosenberg v. Fleuti, 374 U.S. 449 (1963), as this long departure cannot be considered an innocent, casual, and brief excursion into one's native country.

8 C.F.R. Section 211.1 defines temporary absence in terms of a period of time not exceeding one year. This one year is a guideline. Prior regulations have used different periods of time. For example, in Lindonnici v. Davis, 16 F.2d 532 (1920) the regulations in effect defined temporary absence as not exceeding six months. The Court stated in regard to this regulation, at page 534:

"In our opinion this rule is not unreasonable in its application to the circumstances of this case. Hee Fuk Yuen v. White (CCA) 273 F. 10; U.S. ex rel. Randazzo v. Tod (CCA) 297 F.215. The record

discloses that Lindonnici was absent for about three years before his return to the United States; Desiderio about three years; Condioti about nine years; Finaro about eight years. Accordingly, the periods of absence of the plaintiffs were not 'temporary' under the statute and regulations. . . ."

The Second Circuit has spoken conclusively on what it considers a temporary visit, in United States ex rel Lefto v. Day, 21 F. 2d 307 (2nd Cir. 1927). The Court stated at pages 308-9:

> "Without attempting a complete definition of 'a temporary visit,' we may say that we think the intention of the departing immigrant must be to return within a period relatively short, fixed by some early event."

In addition, the Ninth Circuit has addressed itself to this question in Tejeda v. Immigration & Naturalization Service, 346 F. 2d 389 (1965). Although the Court of Appeals remanded the case for further fact-finding, it is significant to note that the majority opinion states in passing (at page 393) that an eighteen month absence might not be temporary within the applicable statutes and regulations. It cannot be said under the circumstances of the case at bar that an absence of eighteen years from the United States is a temporary absence.

CONCLUSION

WHEREFORE, for the reasons set forth above, it is respectfully submitted that this Court should render its decision in favor of respondent and against appellant, affirming the judgment of the District Court in denying the petition for a writ of habeas corpus.

DATED: October 29, 1965.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ Jacqueline L. Weiss
JACQUELINE L. WEISS